Arrow Electric Company, Inc. *and* International Brotherhood of Electrical Workers, Local Union 369, AFL–CIO. Case 9–CA–33757–2

June 13, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 12, 1997, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Arrow Electric Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(b) Make Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision."

2. Substitute the attached notice for that of the administrative law judge.

[1] Chairman Gould would find the employee protest calling for the removal of Supervisor Sonny Collins protected even if Collins had been a high level management official. See his concurrence in *Caterpillar, Inc.*, 321 NLRB 1178, 1184 (1996).

[2] In affirming the administrative law judge's conclusion that the Respondent has not established that it would have taken the same action in the absence of the employees' protected activity, we note that that conclusion is reinforced by the fact that the employees left the job to discuss the matter with Field Supervisor Jeffries. Jeffries had previously told them to come to him if they had any more problems and their departure from the job was to do precisely that.

We have modified the judge's Order to conform to the language traditionally used by the Board.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discipline any of you for engaging in concerted activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ARROW ELECTRIC COMPANY, INC.

James E. Horner, Esq., for the General Counsel.
Robert J. Schumacher, Esq., of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on March 25, 1996, and amended on May 1 and 14, 1996, by International Brotherhood of Electrical Workers, Local Union 369, AFL–CIO (the Union), the Regional Director, Region 9, National Labor Relations Board (the Board), issued a complaint on May 20, 1996, alleging that Arrow Electric Company, Inc. (the Respondent) had committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Louisville, Kentucky, on December 13, 1996, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. A brief submitted on behalf of the Respondent has been given due consideration. On the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation with its principal place of business in Louisville, Kentucky, engaged in the construction industry as a contractor performing industrial and commercial electrical construction.

During the 12-month period preceding May 20, 1996, the Respondent in the conduct of its business operations received revenues in excess of $50,000 for services performed outside the Commonwealth of Kentucky. The Respondent admits, and I find, that at all times material it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

During the early part of 1996,[1] the Respondent was performing work at the Floyd Central High School in Floyd County, Indiana, pursuant to a contract providing for the mounting of television monitors and the installation of related electrical work throughout the school. The work was performed after school was over each day. Field Supervisor Donald Jeffries assigned employees Robert Franklin, Kathleen Jackson, Kevin Simms, Evan Grider, and David Blake to work on the Floyd Central job under the supervision of Sonny Collins, who was in charge of the job. When Collins was not present, Franklin was in charge.

On February 13, after receiving complaints about Collins from employees on the job, Jeffries met with Franklin, Jackson, Simms, and Grider to discuss those complaints.[2] Collins was on another job that day and did not attend this meeting. Franklin testified that he told Jeffries that Collins had a belligerent, disrespectful attitude toward the employees that was slowing down their work and that they needed to sit down and talk it about openly. Jackson testified that she complained about Collins' being disrepectful and humiliating her and threatening to hold her check, which could have been given to her on Thursday night, until Friday. Simms testified that the employees discussed how Collins talked to them on the job, sneaked around and told them they weren't doing their work right. Grider testified that the employees told Jeffries that Collins was belligerent and rude and held up progress on the job. Grider told him that while he hadn't done anything to him, he felt morale on the job was not too good because of Collins. Jeffries agreed to hold another meeting with Collins present the next day.

On February 14, Jeffries held another meeting with the employees which Collins and Blake also attended. According to the testimony of Franklin, Jackson, Simms, and Grider, they repeated their complaints about Collins' belligerent attitude and what they felt was abusive conduct toward Jackson when he yelled at her concerning holding back her paycheck. The meeting ended with Collins apologizing to the employees for his behavior and saying that he would do better and with Jeffries telling the employees that if any more problems arose to come to him about them. The employees' testimony about these meetings was credible and essentially uncontradicted.[3]

On February 22, Franklin had a confrontation with Collins over the method to be used to attach the television monitors. In January, Franklin had discussed with Jeffries his concern over the safety of attaching the monitors with beam clamps which made them wobble and could work loose and cause them to fall. Franklin suggested using toggle bolts to attach the monitors. Jeffries agreed and ordered the toggle bolts for the project. On February 22, Collins informed him that they were to use beam clamps to attach the monitors rather than toggle bolts. He told Collins that he had discussed it with Jeffries who had approved using the toggle bolt method and provided the materials for it. They argued back and forth for about it for half the shift. On Friday, February 23, when Collins arrived at the jobsite approximately 1 hour after work commenced, he reassigned Jackson and Simms to jobs different from those Franklin had assigned them in Collins' absence. In doing so, he gave them detailed orders in a rude and condescending manner that both employees considered demeaning to them. Collins also accused them of failing to clean their work areas, which they denied. At the same time, Collins had Blake deliver a written note to Franklin giving him a work assignment because Collins didn't want to talk to him. Franklin went to see Collins who told him that they were going to be doing things his way and that they would be using beam clamps instead of toggle bolts to attach the monitors. When Franklin mentioned the meeting with Jeffries

[1] Hereinafter, all dates are in 1996.

[2] The Respondent's employees were not represented by a labor organization.

[3] To the extent that Jeffries' testimony and his notes concerning the meetings in the record imply that the principal purpose of these meetings was not to air the employees' complaints about Collins, that he was not informed of their specific complaints against Collins, and/or that Collins did not apologize for his conduct to all of the employees at the February 14 meeting, I do not credit them. He appeared to have little current recollection of the events he testified about and his self-serving notes were rewritten in September, long after the charge was filed and the complaint was issued.

at which they had agreed to stop the bickering, Collins turned his back on him and walked away. That afternoon, Collins also assigned Grider to thread pipe. When Grider said that it took two people to do so safely, Collins refused to give him any help, told him to try it himself, and walked away. The four employees conferred together and decided to go to the company shop to complain about Collins' behavior after Franklin was unable to get in touch with Jeffries by radio, through his pager and by telephoning the shop. They drove directly to the shop and asked for Jeffries. When they were told he was not there, they asked to speak with Company Personnel Director Jessica Thompson. The foregoing findings are based on the credible and uncontradicted testimony of the four employees.

Thompson and her supervisor Ron Schuetter agreed to meet with the employees, individually. In the the interviews, the employees complained about Collins' attitude and the way he treated them and mentioned the previous meetings with Jeffries and Collins. They said that they felt Collins was interfering with production on the job and that they did not want to work with him. The four employees were asked to come to the shop on Monday, February 26, and to fill out a questionnaire Thompson had prepared concerning the walkout, which they did. Thompson and Schuetter reviewed the employees' answers to the questionnaires and concluded that there was nothing that would justify their refusing to work on the job. They were given termination notices at exit interviews on February 27.

The complaint alleges that the four employees were discharged because they had concertedly ceased work and complained to the Employer about their treatment by their supervisor, Collins, and that the discharges violated Section 8(a)(1) of the Act. The Respondent contends that, although the employees' activity in walking out may have been concerted, it was not protected activity under the Act and that, even if it were, they were not discharged because of or in retaliation for engaging in that activity, but each was lawfully terminated for refusing to perform assigned work, an offense for which its established policies and work rules mandated termination.

Analysis and Conclusions

As noted, the Respondent does not dispute that the walkout constituted concerted activity and the evidence is clear that it did. The employees had previously met as a group with Supervisors Jeffries and Collins to complain about the way Collins treated them. Before walking out on February 23, they again talked together about their continued problems with Collins and agreed on a course of action, which was to walk off the job in protest of their treatment by Collins, to go to the shop as a group and reiterate those complaints to management, and to remain off the job until they were remedied. Their action in walking off the job meets the Board's definition of protected activity which is that it "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986); *Meyers Industries*, 268 NLRB 493, 497 (1984).

The Respondent's principal defense is that the employees' actions were not "protected" under the Act. However, the law is clear that the employees' walkout was protected since it arose from a controversy concerning the terms and conditions of their employment. "It is well settled that a concerted employee protest of supervisory conduct is protected activity under Section 7 of the Act." *Millcraft Furniture Co.*, 282 NLRB 593, 595 (1987). Such activity includes a work stoppage. See e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Trident Recycling Corp.*, 282 NLRB 1255, 1261 (1987); *Dirt Digger, Inc.*, 274 NLRB 1024, 1027 (1985). The work stoppage here was in protest of Collins' rude, belligerent, and overbearing behavior, which directly impacted the employees' jobs and their ability to perform them; consequently, their group action in bringing their concerns to management and seeking removal of Collins as their supervisor was protected activity. See, e.g., *Korea News*, 297 NLRB 537, 540 (1990); *Hoytuck Corp.*, 285 NLRB 904, 907 (1987); *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984); *Pacific Coast International Meat Co.*, 248 NLRB 1376, 1380 (1980). The holding in *Vemco v. NLRB*, 79 F.3d 526 (1996), by the U.S. Court of Appeals for the Sixth Circuit, relied on by the Respondent, is not to the contrary and, in any event, involved facts clearly distiguishable from those involved here. *Vemco* states that to be protected, the activity must in some fashion involve the employees' relations with their employer and thus constitute a manifestation of a labor dispute, which the Act defines as "any controversy concerning terms, tenure and conditions of employment," and must involve a reasonably significant impact upon working conditions or some material incident of the employment relationship. The court held that a walkout by employees, who considered the temporary state of their work area to be in such disarray as to be unsafe and impossible to work in, did not meet the foregoing criteria and did not constitute "protected activity" because "the employees were not required to work under the prevailing conditions, were paid for their time when present but unable to work, and did not walk out to protest any company policy." Here, the employees were required to work under the supervision of Collins. They walked out to protest the impact of his behavior on their working conditions and productivity and to effect a change in company policy by having Collins removed as their supervisor, goals which they articulated to the Respondent both before and during the course of the walkout.

The Respondent also contends that the walkout was unprotected because the employees had "no real grievances" but were in effect attempting to dictate who their supervisor should be. This is apparently based on the testimony of Thompson that she considered their complaints about Collins to be too vague and insubstantial to justify their walkout and refusal to return to the jobsite and the fact that the employees indicated that the the job was more productive when Collins was not present and Franklin was in charge. First, her conclusions as to the lack of merit of the employees' complaints about Collins are at odds with the actions of both Jeffries and Collins. Jeffries found them substantial enough to schedule a second meeting at which Collins was present and confronted by the employees. At that meeting, Collins apologized to them for his conduct and promised to do better. Second, the employees clearly informed management that Collins treated them with rudeness and disrespect and provided examples of things that he had said or done that made them feel that way. There is no evidence that those complaints were not based on fact or which suggests that they were fabricated. The Respondent's subjective evaluation of the merits

of the complaints is not controlling. The complaints do not have to be "earth shattering" in order to be protected by the Act so long as they arise from the employees' conditions of employment. *Fair Mercantile Co.*, supra at 1162. The employees also complained that Collins had a bad attitude and gave instructions which interfered with their productivity on the job. Those complaints reveal their "concerns over their working conditions and the impact of the supervisor on those working conditions." *Avalon-Carver Community Center*, 255 NLRB 1064 fn. 2 (1981). I find that there is no evidence that the real purpose of the walkout was to force the Respondent to make Franklin the supervisor of the job. Consequently, I find that the employees' actions in protesting the quality of Collins' supervision, which had a direct impact on their conditions of employment, were protected by the Act.

Finally, the Respondent denies that these employees were discharged because they engaged in protected activity. Where an employer's motivation for taking certain actions is in issue, those actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected activity was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to establish that it would have taken the same action even in the absence of protected activity.

The evidence is undisputed that the employees engaged in protected activity by walking off the job on February 23 to protest their treatment by Collins and to seek his removal as their supervisor and that the Respondent was aware of that activity and informed of the reasons for it. It is also undisputed that leaving the jobsite and refusing to work under the supervision of Collins resulted in their being discharged. Accordingly, I find that the General Counsel has established a prima facie case under *Wright Line*.

I also find that the Respondent has not established that it would have taken the same action even in the absence of protected activity on the part of the employees. It contends that the employees were not discharged for the protected activity of walking out, but for failing to perform assigned work, which is a violation of its work rules. The evidence does not support that contention. According to Thompson, the decision to discharge the employees was made by Schuetter and Scott Saylor, a corporate officer who had to approve the terminations. Neither Schuetter nor Saylor appeared as a witness to disclose on what their decisions were based. Jeffries testified that he was consulted about the disciplinary action to be taken and that he recommended that the employees be terminated because they walked off the job. In any event, the Respondent's purported reason for the discharges involves a distinction without a difference. The reason the employees failed to perform their assigned work was that they walked off the job to protest the conduct of their supervisor. That action was protected under the Act and they could not lawfully be disciplined for engaging in protected activity. There were no other reasons for any of the discharges apart from the employees' having walked out. Accordingly, the Respondent has not established that it would have discharged them if they had not walked out and the discharges violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Arrow Electric Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The walkout by employees on February 23, 1996, to protest their treatment by Supervisor Sonny Collins and seeking his removal as their supervisor, constituted concerted activity protected by Section 7 of the Act.
4. The Respondent violated Section 8(a)(1) of the Act by terminating employees Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider because they engaged in concerted activity protected by the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discharged employees Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider, I shall recommend that it be ordered to offer them immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits, computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Arrow Electric Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they have engaged in concerted protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent

[4]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of their discharges in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."